

lotion formation in an amount of from about 0.05 mg/cm² to about 100 mg/cm². The lotion formulation comprises from about 10% (by total weight of the formulation) to about 89% (by total weight of the formulation) of an emollient, from about 10% (by total weight of the formulation) to about 50% (by total weight of the formulation) of a structurant, and from about 0.1% (by total weight of the formulation) to about 40% (by total weight of the formulation) of a rheology enhancer. The rheology enhancer is selected from the group consisting of dextrin palmitate, dextrin palmitate ethylhexanoate, stearyl inulin, combinations of di-functional alpha-olefins and styrene alone or in combination with mineral oil or petrolatum; combinations of alpha-olefins and isobutene alone or in combination with mineral oil or petrolatum, styrene/butadiene/styrene copolymers, styrene/isoprene/styrene copolymers, styrene-ethylene/butylene-styrene copolymers, styrene-ethylene/propylene-styrene copolymers, (styrene-butadiene)_n polymers, (styrene-isoprene)_n polymers, styrene-butadiene polymers, polyethylene polyisobutylenes, polyisobutenes, and combinations thereof.

Gatto et al. disclose an absorbent article having a stable skin care composition disposed on its skin-contacting surface. The skin care composition contains a substantially anhydrous, oil-based carrier comprising an emollient and, optionally, an immobilizing agent, at least one skin care ingredient, and at least one rheological agent. Suitable emollients, which are present in the skin care composition in an amount of from about 0% (by weight) to about 99.9% (by weight), can include, for example, mineral oil, petrolatum, sucrose ester fatty acids, polyethylene glycol and derivatives thereof, fatty acid ester types, alkyl ethoxylate types,

waxes, and mixtures thereof.¹ The immobilizing agents are present in the skin care composition in an amount of from about 5% (by weight) to about 95% (by weight) and can include C₁₄-C₆₀ fatty alcohols, C₁₄-C₆₀ fatty acids, C₁₄-C₆₀ fatty alcohol ethoxylates, polyhydroxy fatty acid esters, polyhydroxy fatty acid amides, waxes such as carnauba, ozokerite, beeswax, candelilla, paraffin, ceresin, esparto, ouricuri, rezowax, isoparaffin, and combinations thereof.² Additionally, the skin care composition can comprise from about 0.1% (by weight) to about 25% (by weight) rheological agents selected from Type A rheological agents, Type B rheological agents, or mixtures thereof. Type A rheological agents can include fumed silica, organoclays, quaternium-18, hectorites, stearalkonium hectorites, quaternium-18 bentonites, quaternium-18 benzalkonium bentonites, stearalkonium bentonites, and their mixtures with at least one member selected from the group consisting of mineral oil, propylene carbonate, isopropyl palmitate, cyclomethicone, castor oil, lanolin, propylparaben, and C₁₂-C₁₅ alkyl benzoate.³ Type B rheological agents include, for example, polymeric rheological agents such as polymethacrylate polymers, polymethacrylate and styrene copolymers, which can optionally be crosslinked by a common crosslinking agent, polyethylene, polyethylene and acrylic acid or vinyl acetate copolymers, polyisobutylene, poly- α -olefins, bi or tri-component copolymers of styrene and hydrogenate ethylene, propylene, and butylene.⁴

Specifically, Gatto et al. fail to disclose the specific rheology enhancers as required by amended claim 1. These are

¹ See 6,570,054 at column 16, lines 35-61.

² See *id.* at column 19, lines 60-65; column 20, lines 21-23; and column 22, lines 38-43.

³ See *Id.* at column 14, lines 10-66.

⁴ See *Id.* at column 15, lines 58-65.

significant requirements of claim 1 and are significant aspects of Applicants' invention as described in Applicants' specification.

In the Response to Arguments section of the Final Office action, the Office notes that Gatto et al. discloses poly-alpha-olefins alone. While Gatto et al. disclose poly-alpha-olefins in general, no where are the combinations of di-functional alpha-olefins and styrene or combinations of alpha-olefins and isobutene alone or in combination with mineral oil or petrolatum as required in claim 1, taught or suggested in Gatto et al. Specifically, no where in the Gatto et al. reference is it taught or suggested to use di-functional alpha-olefins. Furthermore, no wherein in the cited reference is isobutene taught or suggested. Additionally, the only mention of styrene in Gatto et al. is in column 15, lines 58-61, in which styrenes are present as part of various copolymers.

Additionally, even if the Office is including styrene or isobutene generically in the disclosure of poly-alpha-olefins, Applicants respectfully assert that at best, Gatto et al. may have disclosed the genus of poly-alpha-olefins. Even assuming that the limited disclosure of the Gatto et al. reference discloses this genus, Applicants' claim 1, which includes the combinations of di-functional alpha-olefins and styrene or combinations of alpha-olefins and isobutene alone or in combination with mineral oil or petrolatum, defines a species of that genus no where disclosed in the reference. As stated in M.P.E.P. §2131.02, a genus does not anticipate a claim to a species within the genus, unless the species is clearly named or well delineated. Applicants assert that the broad generic disclosure of poly-alpha-olefins as set forth in Gatto et al.

fails to clearly provide or delineate the combinations of di-functional alpha-olefins and styrene or combinations of alpha-olefins and isobutene alone or in combination with mineral oil or petrolatum, and, as such, cannot anticipate the rheology enhancers required by Applicants' claim 1.

Furthermore, the Office states that the rheology enhancers of claim 1, as amended in Amendment B submitted May 2, 2006, are merely deleted from the instant claim because they are disclosed by Gatto et al., and not because they are disclosed in the instant specification as inferior or less preferred. As stated in M.P.E.P. §2131.04, secondary considerations, such as unexpected results or commercial success, are irrelevant to 35 U.S.C. §102 rejections. Specifically, as stated in M.P.E.P. §2131, a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. As such, the mere fact that Gatto et al. fail to disclose the specific rheology enhancers of claim 1, and as such, fail to disclose each and every limitation of claim 1, is sufficient to determine that claim 1 is novel over the Gatto et al. reference.

Claims 2-6 and 13-18 depend directly from claim 1. As such, claims 2-6 and 13-18 are patentable for the same reasons as claim 1 set forth above, as well as for the additional elements they require.

Claim 37 is similar to claim 1 and further requires the rheology enhancer to be selected from the group consisting of hydrogenated polyisobutene and butylene/ethylene/styrene copolymers; hydrogenated polyisobutene and ethylene/propylene/styrene copolymers and butylene/ethylene/styrene copolymers; isononyl isononanoate

and ethylene/propylene/styrene copolymers and butylene/ethylene/styrene copolymers; isododecane and ethylene/propylene/styrene copolymers and butylene/ethylene/styrene copolymers; isohexadecane and ethylene/propylene/styrene copolymers and butylene/ethylene/styrene copolymers; and combinations thereof.⁵

As Gatto et al. fail to disclose the specific rheology enhancers required by claim 37, Gatto et al. fail to disclose each and every limitation of claim 37. As such, claim 37 is novel over the Gatto et al. reference.

Claim 41 depends directly from claim 21, which is similar to claim 1 and further requires the lotion formulation to have a melt point viscosity of from about 5000 cPs to about 1,000,000 cPs and a process temperature viscosity of from about 50 cPs to about 50,000 cPs. As such, claim 41, which depends on claim 21 is patentable for the same reasons as claim 21, as well as for the additional elements it requires. Particularly, Gatto et al. fail to disclose each and every limitation of claim 21 as Gatto et al. fail to disclose the specific rheology enhancers required by claim 21.

⁵ Applicants respectfully note that claims 37 and 41, as pending, no longer require mineral oil as a rheology enhancer. Specifically, claims 37 and 41 are directed to the known blends of Versagel, which as noted in the instant specification on page 21, paragraph 52 and also as shown in Table 4 of Example 1, are preferred rheology enhancers for use in Applicants' lotion formulation.

2. Rejection of Claims 7-12 and 19-36 under 35 U.S.C. §102(e) or 35 U.S.C. §103(a).

Claims 7-12 and 19-36 have been rejected under 35 U.S.C. §102(e) as anticipated by Gatto et al. (U.S. 6,570,054) or, in the alternative, under 35 U.S.C. §103(a) as obvious over Gatto et al.

Claims 7-12 and 19-20 depend directly on claim 1, which is discussed above. As such, claims 7-12 and 19-20 are patentable over Gatto et al. reference for the same reasons as claim 1 set forth above, as well as for the additional elements they require. Specifically, Gatto et al. fail to disclose or suggest the specific rheology enhancers of claim 1.

In order for the Office to show a *prima facie* case of obviousness, M.P.E.P. §2143 requires that the Office must meet three criteria: (1) the prior art reference must teach or suggest all of the claim limitations; (2) there must be some suggestion or motivation, either in the reference itself or in the knowledge generally available to one of ordinary skill in the art, to modify the reference, and (3) there must be some reasonable expectation of success. The Office has clearly failed to meet its burden under number (1) and/or (2) above, as the cited reference has not taught or suggested all of the claimed limitations of Applicants' claims 7-12 and 19-20, and there is no motivation or suggestion to modify the Gatto et al. reference to arrive at each and every limitation of Applicants' invention.

As noted above, Gatto et al. fail to disclose or suggest the specific rheology enhancers of claim 1. Furthermore, there is no motivation or suggestion to modify the Gatto et al. reference to arrive at the instantly claimed rheology

enhancers. Specifically, no where is there motivation to substitute the rheology enhancers of claim 1 for one of the multiple rheological agents disclosed in Gatto et al.

With all due respect, it appears that the Office has used impermissible hindsight analysis and reconstruction when modifying the Gatto et al. reference.⁶ Notably, it would be clear to one skilled in the art reading Gatto et al. that a skin care composition can include a rheology enhancer. There are, however, a myriad of rheology enhancers, many of which are used in skin care compositions. What is important is that there is no motivation or suggestion to use the rheology enhancers as claimed in amended claim 1, over any of the other enormous number of rheology enhancers described in the art.

Because there is no motivation or suggestion to modify the reference cited by the Office, claim 1 is patentable. As such, claims 7-12 and 19-20, which depend on claim 1 are patentable for the same reasons as claim 1 set forth above, as well as for the additional elements they require.

Claim 21, which is discussed above, is similar to claim 1, and as such, is patentable over the Gatto et al. reference for the same reasons as claim 1 set forth above. As such,

⁶ M.P.E.P. §2142 provides that in order to reach a proper determination under 35 U.S.C. §103(a), the Examiner must step backward in time and into the shoes worn by the hypothetical "person of ordinary skill in the art" when the invention was unknown and just before it was made. Knowledge of Applicants' disclosure must be put aside in reaching this determination, yet kept in mind in order to determine the "differences." The tendency to resort to "hindsight" based upon Applicants' disclosure is often difficult to avoid due to the very nature of the examination process. However, as stated by the Federal Circuit, impermissible hindsight must be avoided and the legal conclusion must be reached on the basis of the facts gleaned from the prior art. Grain Processing Corp. v. American-Maize-Products, Co., 840 F.2d 902, 904 (Fed. Cir. 1988).

claims 22-36, which depend on claim 21, are patentable for the same reasons as claim 21, as well as for the additional elements they require.

3. Rejection of Claims 1-6 and 10-18 for Obviousness Type Double Patenting

Claims 1-6 and 10-18 have been provisionally rejected under the judicially-created doctrine of obviousness-type double patenting as being unpatentable over claims 1-14 of co-pending U.S. Patent Application No. 10/659,967.

Applicants respectfully call the Office's attention to MPEP §804, I.B.1., which notes that if "provisional" obviousness-type double patenting rejections in two applications are the only rejections remaining in those applications and both applications are filed on the same day, the examiner should determine which application claims the base invention and which application claims the improvement (added limitations). The obviousness-type double patenting rejection in the base application can be withdrawn without a terminal disclaimer, while the obviousness-type double patenting rejection in the improvement application cannot be withdrawn without a terminal disclaimer. The present application and copending Application No. 10/659,967 were both filed on September 11, 2003. As this provisional rejection is not the only rejection in the present application, Applicants would like to delay responding to this rejection. If the Office has any questions please contact Mr. Christopher M. Goff at 314-231-5400.

Even if upon entry of this Letter To Patent And Trademark Office, the 102(e) and/or 103(a) rejections are overcome (which Applicants believe that they have) and the provisional

obviousness-type double patenting rejection is the only rejection remaining in the present application, the present rejection is premature. As stated in MPEP §804, I.B.1., since it is not evident which of the pending applications the Office would determine to be the "base application," any action with regard to the present rejection is premature, until such a determination has been made.

CONCLUSION

In view of the above, Applicants respectfully request allowance of all pending claims. The Commissioner is hereby authorized to charge any fee deficiency in connection with this Letter To Patent And Trademark Office to Deposit Account Number 19-1345.

Respectfully submitted,

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